IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL SIDE JURISDICTION

Arbitration Application No. 163 of 2006

M/s G.G. Photo Limited
a company incorporated under the provisions of the Companies Act 1956, having its registered office at No 42 Irish Park, Juhu Mumbai 400049 represented by its authorised signatory Mr. Anand B Mishra. ..Applicants.

vs

1. Aftab Pictures P Ltd
   a company incorporated under the provisinos of the Companies Act 1956 having its registered office at 2, Link Way, 14th Road, Khar West Mumbai 52 represented by its director Mr.Salim Akhtar

2. Salim Akhtar
   of Mumbai Indian Inhabitant Director of the lst respondent company carrying on business at 2 Link Way, 14th Road, Khar West Mumbai 52

3. Shama Akhtar
   of Mumbai Indian Inhabitant Director of the lst respondent company carrying on business at 2 Link Way, 14th Road, Khar West Mumbai 52

4. Nasim Bano
   of Mumbai Indian Inhabitant

Director of the lst respondent
company carrying on business at
2 Link Way, 14th Road, Khar West
Mumbai 52 .. Respondents

Mr D.F. Dharam for the applicants.
Mr A.K. Prajapati for respondents.

CORAM: SWATANTER KUMAR,C.J.

Judgment reserved on 13th July 2007
Judgment delivered on 17th August 2007

JUDGMENT:

In this arbitration application filed under section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the Act", while invoking the arbitration clause contained in the agreement entered into between the parties, the applicant prays for appointment of a sole arbitrator to adjudicate upon the disputes that have arisen between the parties. The applicant is a limited company carrying on its business. In the normal course of its business, respondent No.1 approached the applicant for financial assistance to the extent of Rs.75 lacs for production of a Hindi film titled “Chand Sa Roshan Chehra”. The applicant informed the said respondent that without tangible security, it was not possible to give the loan. Finally the parties entered into an agreement dated 19th February 2005 assigning certain limited copyrights in the

said film for a period of 5 years, which were to commence from the expiry of 3 months from the first theatrical release of the said film. The agreement was termed as limited copyrights agreement in furtherance to which the respondent is stated to have received Rs.75 lacs. It was stated in the agreement that the copyright was free from all encumbrances whatsoever and no rights have been assigned as awarded to the applicant. In the event there was any breach of the terms of the agreement, under clauses 9.1.1 and 9.1.2. it was provided that the applicant would be at liberty to terminate the agreement, particularly, if the delivery was not given within the stipulated time. According to the applicant, despite having received the entire amount and assignment agreement, still the respondents committed serious breaches and failed to obtain confirmation from the laboratory concerned where the said film was being processed in favour of the applicant. Vide letter dated 25th February 2005 limited copy right assigned to the applicant was subject to a charge in favour of Canara Bank and this fact was suppressed by the respondents. Another restriction came to the notice of the applicant on 15th March 2003 that the Indian Film Exporters Association, a trade body, had prohibited the respondents from exercising directly or assigning to any person the

limited copyright without first paying a sum of Rs.45 lacs to Zee Telefilms Limited. As a result of the above breaches on the part of the respondents, serious disputes arose between the parties and the applicant filed a petition under section 9 of the Act, being Arbitration Petition No.131 of 2006, and vide order dated 5th June 2006 ad-interim order was granted with a direction that the applicant should take steps to invoke and implement the arbitration clause within four weeks. This resulted in filing the present application.

In the reply filed on behalf of the respondents facts have been disputed. However, it is not disputed that a sum of Rs.75 lacs was taken and it was for Cable TV Rights for India for a period of 5 years including Whole World Sattelite Television exclusive Broadcasting Rights and Overseas Sattelite Television exclusive for Multiple Telecastes. The Indian Film Exporters Association had got a judgment against the respondents, which according to them was not sustainable in law. The suit filed by them was ultimately dismissed on 16th September 2005. Finally section 9 petition as well as the order passed thereunder is not disputed. It is denied that

there are any disputes or claims of the applicant, which are sustainable in law.

At the very outset it may be noticed that when the applicant filed the petition under section 9 of the Act, the court on 5th June 2006 passed an order, relevant portion of which reads as under:

> "Mr Sharma, the learned counsel appearing on behalf of the petitioner, agrees and undertakes to take all steps necessary to invoke and implement the arbitration clauses within a period of four weeks from today. The statement is accepted.
>
> In the circumstances the petition is disposed of in terms of the ad-interim order dated 10.4.2006"

Execution of the agreement and the fact that the said agreement contains clause 45 as arbitration clause is not disputed. It is, however, averred that no notice was given to the respondents for invocation of the arbitration clause and as such the application under section 11 is not maintainable. This objection, on the face of it, is not tenable. An affidavit was filed on behalf of the applicant that in furtherance to the agreement dated 19th May 2005 and the arbitration clause contained therein, they had invoked the arbitration clause as well as recommended the name of their

nominee as the sole arbitrator. This notice dated 15th February 2006 was duly served on the respondents and the applicant has placed on record the photo copy of the postal receipts as well as acknowledgment showing due service upon the respondents. Thus the argument raised on behalf of the respondents is without any merit and in fact is an afterthought to frustrate this application. Once an half hearted attempt was also made to argue that steps were required to be taken within four weeks in terms of the statement made by the learned counsel appearing in the petition under section 9 of the Act from the order dated 5th June 2006 and since they did not take steps within the said period and the application was filed on 11th July 2006, applicants have lost their right to pursue the remedy under section 11 of the Act. This argument is misconceived in law and is without any merit. Firstly, the applicants had already served a notice upon the respondents on 15th February 2006 and respondents failed to respond to the said notice and act in accordance with law. They cannot take the advantage of their own wrong. Furthermore, the period of four weeks is not so sacrosanct so as to defeat the benefit of limitation available to the applicant under the statute itself.

The arguments advanced on behalf of the respondents are without any merits. The arbitration agreement, its legality and correctness is not in dispute. From the record it is clear that a notice as contemplated under section 11 of the Act was duly served upon the respondents. The existence of dispute between the parties is manifestly clear from the pleadings of the parties in this application. Thus there is no reason as to why this application be not allowed and sole arbitrator is not appointed in terms of Clause 12.1.2, which reads as under:

> "In the case of such failure, the dispute shall be referred to a sole arbitrator or in case of disagreement, to a panel of three arbitrators, one of whom shall be appointed by Assignor and one by Assignee. The third arbitrator shall be mutually appointed by the two arbitrators".

Shri Jutice A.C. Agarwal and Shri Justice M.S.Rane, retired Judges of this Court are appointed as arbitrators who may in turn mutually appoint third arbitrator, who shall act as the Presiding Arbitrator. The arbitration proceedings may be completed expeditiously.

Accordingly this application is allowed, leaving the parties to bear their own costs.

The Prothonotary and Senior Master to communicate this order to the learned arbitrators.

CHIEF JUSTICE